In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-545

LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO, LOCAL 478, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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1. Between July 6 and August 4, 1970, International Builders of Florida, Inc. employed L. R. Wilson, a white man, as general foreman, and Eugene Davis, a black, as a temporary foreman (Pet. App. 23-24). On August 4, the Company, believing that Wilson had been cleared by the Union,[1] told Davis and the Union that the job did not warrant two foremen and, accordingly, that Davis would be returned to laborer status (Pet. App. 24-25). The next day, the employees, represented by the Union, struck and the Company, in response, reinstated Davis as a foreman (Pet. App. 25-26).

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[1]Wilson was a member of another local and the Company agreed to hire him as a temporary foreman pending clearance by the Union (Pet. App. 23-24).

The Company continued to operate with both Wilson and Davis serving as laborer foremen until August 21, when Wilson was discharged because the Company could not afford two foremen (Pet. App. 29). After Wilson's departure, Davis was told that he was the general laborer foreman and that he was to supervise the laborers; his functions included the handling of employee grievances (Pet. App. 33). Wilson then filed an unfair labor practice complaint with the Board (Pet. App. 21).

2. The Board (Member Jenkins dissenting) held that the Union had "restrain[ed] or coerce[d] * * * [the Company] in the selection of his representatives for the purposes of * * * the adjustment of grievances," in violation of Section 8(b)(1)(B) of the National Labor Relations Act, 29 U.S.C. 158(b)(1)(B) (Pet. App. 7-8; 32-33). The Board denied the Union's motion to reopen the record for the purpose of producing evidence regarding racially discriminatory or oppressive working conditions under Wilson. The Board explained (Pet. App. 8):

> Contrary to our dissenting colleague, we do not view our decision as barring the protest of the Employer's employees with respect to Wilson's treatment of them, whether or not it was racially motivated. Clearly, Wilson, while a general foreman, was an agent of the Employer and the conditions of employment which he imposed upon the employees were the Employer's conditions. At all times the employees were free under Sections 7 and 13 of the Act to invoke their statutory rights with respect to these alleged unreasonable or unfair conditions. * * * This is not to say, however, that the right to strike or engage in concerted activity because of unfair conditions of employment includes the right to dictate to an employer the selection of

> a particular supervisor, here Davis, who would have the power to engage in collective bargaining or adjust grievances. The Administrative Law Judge found, and we agree, that both Wilson and Davis had the power, and did, adjust grievances for the employees. Under these circumstances, we hold that the Respondent Union, whatever its motivation, could not by restraint and coercion force the Employer to select Davis rather than Wilson for such purposes.

The Board ordered the Union, *inter alia*, to "notify the Employer that it has no objection to the Employer hiring Wilson in the capacity formerly held by him * * * [and to] make Wilson whole for any loss of earnings he may have suffered as a result of the unlawful conduct found herein" (Pet. App. 35).

3. The court of appeals, in a *per curiam* opinion, upheld the Board's decision and enforced its order (Pet. App. 3-6). The court stated (Pet. App. 4-5):

> The Union argues that the prohibition of §8(b)(1)(B) must yield to the right of workers to be free of racial discrimination in their employment. The Board responds that the employees may fully assert their right to non-discriminatory treatment, through legal remedies as well as self-help measures protected by Section 7 of the Act, so long as they protest the discriminatory treatment and do not demand the removal or appointment of a particular management "representative." In short, the Board says that protest must be directed, at least in the ordinary case, at the alleged discriminatory conduct, rather than the identity of the supervisor whose conduct is challenged.
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> We believe the Board's principle is a reasonable harmonization of Section 7 and 8, and that the principle was properly applied in this case.

4. The petition (p. 3) raises only the issue whether the Board has power to award backpay to a wrongfully discharged supervisor. Since that question was not raised before the Board or the court of appeals, it cannot be

raised here. Section 10(e) of the Act, 29 U.S.C. 160(e), forecloses from judicial review any objection not presented to the Board in the party's exceptions to the Administrative Law Judge's decision. *Marshall Field & Co.* v. *National Labor Relations Board*, 318 U.S. 253, 255-256. Petitioner's exceptions to the Law Judge's decision did not challenge the backpay award.[2] Similarly, this Court has consistently held that issues not raised in the courts below will not be entertained on review here. *Duignan* v. *United States*, 274 U.S. 195, 200; *Lawn* v. *United States*, 355 U.S. 339, 362, n. 16. In the court of appeals, petitioner's "sole contention * * * [was] that the Board erroneously ruled evidence of racial discrimination irrelevant"[3] (Pet. App. 4).[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

PETER G. NASH,
General Counsel,
National Labor Relations Board.

JANUARY 1975.

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[2]Petitioner's exceptions are set out in the appendix to the briefs printed for use in the court of appeals, Volume II, pp. 475-477. A copy has been lodged with the Clerk.

[3]Copies of petitioner's brief and reply briefs in the court of appeals have been lodged with the Clerk.

[4]The fact that the Ninth Circuit's decision in *National Labor Relations Board* v. *Silver Bay Local Union No. 962*, 498 F.2d 26 (Pet. 6), was not entered until May 22, 1974, does not excuse petitioner's failure to raise the backpay issue in timely fashion. See *United States* v. *Tucker Truck Lines*, 344 U.S. 33.

Petitioner's reliance on *National Labor Relations Board* v. *Mansion House Center Management Corp.*, 473 F. 2d 471 (C.A. 8) (Pet. 8), is misplaced. The issue there was whether the Board had power to issue a bargaining order in favor of a union which had racially discriminatory membership policies.